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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

Number 22.

JAMES P. WESBERRY, JR., and CANDLER CRIM, JR.,
Appellants,

v.

CARL E. SANDERS, as Governor of the State of Georgia,
and
BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

BRIEF FOR THE APPELLANTS.

OPINION BELOW.

The opinion of the United States District Court for the Northern District of Georgia is reported in **Wesberry v. Vandiver**, 206 F. Supp. 276 (N. D. Ga. 1962) and is printed at pages 35 through 55 of the Record.

JURISDICTION.

This action was brought pursuant to Title 42, United States Code, Section 1983, by qualified Georgia voters to have declared unconstitutional and to enjoin the enforcement of the Georgia Congressional-District Reapportionment Act of 1931, which infringes their right to vote for members of the House of Representatives, in violation of the rights, privileges and immunities conferred by the Constitution and laws of the United States. The jurisdiction of the District Court was predicated upon Title 28, United States Code, Section 1343 (3) and (4), and Sections 2201 and 2281. The judgment of the District Court was entered on June 20, 1962 (R. 51) and the notice of appeal was filed in that Court on August 17, 1962 (R. 55).

The jurisdictional statement was filed in this Court on October 12, 1962, and probable jurisdiction was noted on June 10, 1963 (R. 56). **Wesberry v. Sanders**, 373 U. S. 802, 83 S. Ct. 1691, 10 L. Ed. 2d 1029 (1963). The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b).

QUESTIONS PRESENTED.

Whether an apportionment of congressional districts which arbitrarily deprives the Appellants of more than one-half of their effective voice in federal elections for the Representatives in Congress violates the Equal Protection Clause of the Fourteenth Amendment.

Whether a congressional apportionment which deprives the Appellants of a majority of their representation in the House of Representatives deprive them of those privileges and immunities of national citizenship which are secured by the Fourteenth Amendment.

Whether the federal courts have jurisdiction of this action to enjoin the election of members of the House of Representatives under a grossly discriminatory apportionment of congressional districts which is violative of the Constitution.

STATUTE INVOLVED.

The Georgia Congressional District Reapportionment Act of 1931, Ga. Laws 1931, p. 46, Ga. Code § 34-2301 (1933), is set forth in Appendix A.

STATEMENT.

This action was brought in the United States District Court for the Northern District of Georgia by the Appellants, citizens of the United States, each of whom is a resident of Fulton County, Georgia, a registered voter of the State, and qualified to vote in elections of members of the House of Representatives from the Fifth Congressional District.

The Defendants are the Governor[1] and the Secretary of State of Georgia, who are responsible for the preparation of the ballots, the certification of candidates, the counting of returns, and the certification of Representatives-elect in elections for members of the House of Representatives of the Congress of the United States.

The complaint challenges the validity of the Georgia Congressional District Reapportionment Act of 1931 on grounds that it infringes Appellants' right to a full and equal ballot in elections for members of the House of Representatives, in violation of the rights, privileges and immunities secured by the Constitution and laws of the United States, 42 U. S. C., § 1983.

Under the reapportionment of the House of Representatives which followed the census of 1930, the number of congressional seats to which Georgia was entitled in the House of Representatives was reduced from twelve to ten Representatives. In 1931 the General Assembly reapportioned the State into ten congressional districts varying in population from 218,496 in the Ninth District to 396,112 in the Fifth District (Metropolitan Atlanta). By 1940 the disparity between the Fifth and Ninth Congressional Districts

[1] On January 15, 1963, Carl E. Sanders succeeded S. Ernest Vandiver as Governor of the State of Georgia and was substituted as a party defendant in accordance with Rule 48 (3) of the Rules of this Court.

had climbed to 252,244; by 1950 to 472,234, and by 1960 it had reached 551,526 people; yet the General Assembly has made no attempt to correct this discrimination. The following charts are illustrative of the disparities resulting from the perpetuation of the 1931 apportionment.

Georgia Congressional Districts 1932.*

District	Population 2,891,763	Deviation From Mean (289,176)	Value of Vote (Largest = 1)
First	328,214	1.13	1.21
Second	263,606	.91	1.50
Third	339,870	1.18	1.17
Fourth	261,234	.90	1.52
Fifth	395,112	1.37	1.00
Sixth	281,437	.97	1.41
Seventh	271,680	.94	1.46
Eighth	241,847	.84	1.64
Ninth	218,496	.76	1.81
Tenth	289,267	1.00	1.37

Georgia Congressional Districts 1962.**

District	Population 3,943,116	Deviation From Mean (394,311)	Value of Vote (Largest = 1)
First	379,933	.96	2.17
Second	301,123	.76	2.74
Third	422,198	1.07	1.95
Fourth	323,489	.82	2.55
Fifth	823,680	2.09	1.00
Sixth	330,235	.84	2.49
Seventh	450,740	1.14	1.83
Eighth	291,185	.74	2.83
Ninth	272,154	.69	3.03
Tenth	348,379	.88	2.36

* 1930 Census.

** 1960 Census; R. 39.

By 1962, after thirty years without reapportionment, the population of the Fifth District had soared to 823,680, to become the second largest congressional district in the United States (R. 79). The more than 820,000 people residing in Fulton, DeKalb, and Rockdale Counties, comprising the Fifth Congressional District, constitute more than 20% of Georgia's entire population and yet possess only one-tenth of its representation in Congress. Although the Fifth District has more than 2.7 times the population of the Second District, 2.8 times that of the Eighth District, and more than 3 times that of the Ninth Congressional District, each district sends one Representative to the House.

Based upon an extensive analysis of these facts, which were undisputed, the three-judge district court found that:

> "It is clear by any standard however that the population of the Fifth District is grossly out of balance with that of the other nine congressional districts of Georgia . . . [R. 40; 206 F. Supp. 276, 279-80].
>
> ". . .
>
> "It is readily apparent from these undisputed facts that the plaintiffs, not unlike many millions of other citizens throughout the Republic, are being deprived of equal treatment arising from the excess in population of their congressional district as compared with that of the other districts in Georgia [R. 44; 206 F. Supp. 276, 281].
>
> ". . .
>
> "In our view, the statute here when enacted reflected a rational state policy to set up the congressional districts in Georgia with some reasonable relation to population. On the other hand, it now reflects a system which has become arbitrary through inaction when considered in the light of the present

population of the Fifth District and as measured by any conceivable reasonable standard" [R. 45; 206 F. Supp. 276, 282].

Despite these findings of fact, however, the majority of the court concluded that the apportionment lacked the invidiousness proscribed by the Constitution, and, accordingly, dismissed the complaint [R. 45; 206 F. Supp. 276, 282].[2]

At the 1963 session of the Georgia General Assembly a bill[3] was introduced to reapportion Georgia's ten congressional districts on a more equitable basis. It was referred to the Rules Committee of the Senate, where it died without report. Subsequently, a resolution[4] calling for the creation of a joint Senate-House study committee was passed by the Senate, but was reported unfavorably in the House, ending all attempts at reapportionment at that session of the General Assembly.

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[2] Chief Judge Elbert P. Tuttle concurred in part and dissented in part from the opinion of the majority (R. 51).

[3] Senate Bill No. 101.

[4] Senate Resolution No. 56.

SUMMARY OF ARGUMENT.

The right of the people to equality of representation in the House of Representatives constitutes a fundamental presupposition upon which that body which Mason proudly characterized as the "grand depository of democratic principle" is founded. Indeed, it is in the House of Representatives that the Framers of the Constitution sought to epitomize the equalitarian principles of the Declaration of Independence by affording representation to "the People". By insuring equality of political participation to its people, the government secures not only the strength of popular support, but affords to each citizen the security of an attentive consideration of his rights by those in power. Here lies the genius of representative government. **Rice v. Elmore**, 165 F. 2d 387, 392 (4 Cir., 1947). However, the government is responsive only to those upon whom its power depends. The disenfranchisement of large segments of the people due to the failure of the States to properly reapportion congressional districts threatens to undermine these basic principles upon which the structure of government rests.

The principle of equality so eloquently declared in the Declaration of Independence has pervaded every aspect of our government from the time of its inception. This principle is particularly applicable to the election of Representatives in the popular house of the National Legislature, for by the clear implication of Article I, Section 2 and Section 2 of the Fourteenth Amendment, Representatives in Congress must be apportioned equally among the people within each of the several States according to their numbers. **Colegrove v. Green**, 328 U. S. 549, at 570, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946). Despite these constitutional imperatives, Georgia has perpetuated a system of congressional districts which the District

Court found to be "grossly out of balance" and "arbitrary as measured by any conceivable reasonable standard." These disparities between congressional districts which deprive the Appellants of more than one-half their representation in Congress are invidiously discriminatory and contravene the Equal Protection Clause of the Fourteenth Amendment.

The right of the Appellants as electors qualified under the laws of the State of Georgia to full and equal representation in the House of Representatives is a privilege and immunity of national citizenship which is secured against invasion by the State by the Privileges and Immunities Clause of the Fourteenth Amendment. **Twining v. State of New Jersey**, 211 U. S. 78, 97, 29 S. Ct. 14, 19, 53 L. Ed. 97 (1908). The right of a qualified citizen to participate in the selection of national officers is inherent in the nature of our government as one republican in form, and characterizes the relationship which exists between a citizen and the general government. It is the Constitution which creates the right to vote for members of Congress. It establishes the office, declares that it shall be elective and adopts as its criteria the qualifications prescribed by the States for the election of the most numerous branch of their legislatures. This right includes more than the right to merely mark a ballot and deposit it in a box. It includes the right to have that ballot counted. **United States v. Classic**, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941). The right of the people to choose includes the right to have their ballots counted at their full value undiminished by fraudulent ballots which may be cast in the same election, to the end that an individual voter will not be deprived of his full measure of participation in the selection of Representatives. **United States v. Saylor**, 322 U. S. 285, 64 S. Ct. 1101, 88 L. Ed. 1341 (1944). Yet, the right to

cast a ballot of full value is of little consequence if a State may, by the manipulation of congressional districts, deprive the ballot of all practical significance. Thus, it is apparent that the right of the people to vote for members of Congress and the right to full representation in Congress by districts of equal size are complementary in the constitutional structure. The protection of each is essential to the fulfillment of the other to the end that the government will remain responsive to the will of the people. For this reason, both are within the protection of the Privileges and Immunities Clause of the Fourteenth Amendment.

The jurisdiction of the federal courts over actions involving the apportionment of congressional districts is well established in the decisions of this Court. **Colegrove v. Green,** 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946); **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932). Although Congress is authorized to alter the regulations governing congressional elections enacted by the State, this power is not exclusive of the jurisdiction of the federal courts. Rather, the powers of the two branches of government may be exercised concurrently. Thus, in **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932), this Court reviewed and held invalid the apportionment of Minnesota's nine congressional districts. In an opinion by Mr. Justice Hughes, the election of Representatives under the invalid apportionment was enjoined and all nine Representatives were ordered elected state-wide on an at-large basis, if the state legislature failed to reapportion prior to the election.

There is here no room for the application for the presumption of constitutionality which usually appertains to state legislative action. The disparities in population between congressional districts are not the product of a ra-

tional legislative judgment. Rather, they are the result of the perpetuation of the apportionment of 1931 long after its basis has been eroded away by the massive shifts in population which have occurred since its enactment and which make irrational its continued application to elections of congressmen. **Nashville, C. & St. L. Ry. v. Walters,** 294 U. S. 405, 415, 55 S. Ct. 486, 79 L. Ed. 949 (1935). The frequency and magnitude of the inequalities between congressional districts, as well as the manner of their creation, admits of no rational legislative policy whatever. **Baker v. Carr,** 369 U. S. 186, 254, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). This encroachment upon the fundamental rights of the Appellants may be sustained only upon a strong showing by the State of some compelling interest, paramount to that of the Appellants, which demands the sacrifice of their rights to an equal voice in the selection of representatives. **Bates v. City of Little Rock,** 361 U. S. 516, 524, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960). This the Defendants have not even attempted. Thus, the irrational and invidious apportionment of Georgia's ten congressional districts must be stricken as in contravention of the Fourteenth Amendment.

ARGUMENT.

I. The Right of the People to an Equal Voice in the Selection of Representatives in Congress Is Fundamental in the Structure of the House of Representatives.

"In a free representative government nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with their own will . . ." **Twining v. New Jersey**, 211 U. S. 78, 106, 29 S. Ct. 14, 53 L. Ed. 97 (1908). It is this principle of political equality, antedating the Constitution, which has characterized our republic from its inception and which pervades all of our political institutions.[5] It was this philosophy which Jefferson eloquently expressed in our first national document, the Declaration of Independence:

> "We hold these truths to be self-evident that all men are created equal; that they are endowed by their Creator, with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and institute new governments. . . ."[6]

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[5] 2 Journals of Congress 229 (1776). "'Equal representation', wrote Jefferson to King on November 19, 1819, 'is so fundamental a principle in a true republic that no prejudices can justify its violation because the prejudices themselves cannot be justified.'" Quoted from De Grazia, *General Theory of Apportionment*, 17 Law & Contemp. Prob. 257, 261 (1952).

[6] Declaration of Independence, 2 Journals of Congress 229, (1776). "While [the Declaration of Independence] may not have the force of organic law, or be made the basis of judicial decision

It is significant that primary among the charges against George III which incited the Revolution was that:

> "He has refused to pass other laws, for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them, and formidable to tyrants only."

Although the equality of representation of the States which existed under the Articles of Confederation was preserved in the Senate, it was in the House of Representatives that the Framers of the Constitution sought to epitomize on a national scale the equalitarian principles of the Declaration of Independence by affording representation to "the People."[7] Thus, in the words of George Mason, the House "was to be the grand depository of the democratic principle of the Government."[8] It seems to have been assumed by all the delegates to the Constitutional Convention that all qualified citizens would have an equal voice in the selection of Representatives. The

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as to the limits of right and duty, and while in all cases reference must be had to the [Constitution] the letter of which the former is the thought and the spirit, . . . it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." *Gulf, Colorado and Sante Fe Railway Co. v. Ellis*, 165 U. S. 150, 160, 17 S. Ct. 255, 41 L. Ed. 666 (1897).

[7] "As to Congress, . . . it is at least tenable to conclude that representation of the relevant constituent political units, without regard to population base, is wholly taken care of in the Senate, and that the House, which is to be elected by the people *pro rata*, is to represent the popular principle fully and effectively. Surely it would not be strange to find that one part of one branch of a democratic government lives under that requirement." Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 Yale L. J. 13, 17 (1962).

[8] I Farrand, *The Records of the Federal Convention of 1787*, 48 (1937).

language of Article I, Section 2 is a clear reflection of this assumption.

> "The House of Representatives shall be composed of Members chosen every second Year by the People. . . .
>
> "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers."

Although the delegates to the Convention expressed primary concern that Representatives should be fairly apportioned among the several states, the speeches of such prominent delegates as James Madison and Edmond Randolph provide a clear insight into the understanding of the Framers of the Constitution that the constitutional policy went even further to forbid the unequal apportionment of Representatives within a single State.

Thus, in urging the adoption of the provisions of Article I, Section 4, reserving to Congress the power to make or alter regulations prescribed by the States for the election of Senators and Representatives, Madison said:

> "The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. . . . This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrolled right of reguiating the times, places and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the

> **Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. . . .**" (Emphasis supplied.)

And Randolph, in supporting the adoption of the provisions of Article I, § 2, cl. 3, requiring that Representatives be reapportioned following each decennial census, said:

> ". . . If equality between great & small States be inadmissible, because in that case unequal number of Constituents wd. be represented by equal number of votes; **was it not equally inadmissible that a larger & more populous district of America should hereafter have less representation, than a smaller & less populous district. If a fair representation of the people be not secured, the injustice of the Govt. will shake it to its foundations. . . .**" (Emphasis supplied.)

Indeed, these statements seem to have reflected the sentiments of the entire Convention, for they were undisputed. Similar statements of disapproval of inequitable apportionments were expressed in the state ratifying conventions. Lewis, **Legislative Apportionment and the Federal Court**, 71 Harv. L. Rev. 1057, 1071-73 (1958).

The understanding of the Framers that Representatives were to be apportioned equally derives strong support from **The Federalist**. Madison, in discussing the apportionment of Representatives in Number 57, said:

> "[E]ach representative of the United States will be elected by five or six thousand citizens."[10]

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[9] I Farrand, *The Records of the Federal Convention of 1787*. 579-80 (1937).

[10] Cooke Edition, page 388 (1961). A further indication of Madison's assumption that Representatives were to be elected by

Thus, it seems clear that the language of the Constitution conferring representation upon "the People" was intended to establish a uniform federal standard of equal popular representation in the House of Representatives which neither the States nor the Congress may vary. As Mr. Justice Douglas said in **MacDougall v. Green**, 335 U. S. 281, 290, 69 S. Ct. 1, 93 L. Ed. 3 (1948) (dissenting opinion):

> "The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government."

A. The Gross Inequalities Between Georgia's Congressional Districts Which Deprive Appellants of More Than One-Half of Their Effective Voice in the Selection of Representatives in Congress Violates the Equal Protection Clause of the Fourteenth Amendment.

The principle of equality so eloquently declared in the Declaration of Independence has pervaded every aspect of our governmental structure from the time of its inception. **United States v. Cruikshank**, 92 U. S. (2 Otto) 542, 555, 23 L. Ed. 588 (1874). Always implicit in the concept of due process of law [**Bolling v. Sharpe**, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954); **Twining v. New Jersey**, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908)], the

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districts of equal size in his discussion of the probable method of election in Pennsylvania:

> "Some of her counties which elect her State representatives, are almost as large as her districts will be by which her Federal Representatives will be elected. The City of Philadelphia is supposed to contain between fifty and sixty thousand souls. *It will therefore form nearly two districts for the choice of Federal Representatives*" (Emphasis supplied).

Id. page 389; see Hacker, *Congressional Districting, The Issue of Equal Representation*, 11 (1963).

constitutional guaranty of equality was reaffirmed by the Fourteenth Amendment. It cannot now be doubted that the protection of the Equal Protection Clause extends to political rights. **Gray v. Sanders**, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963); **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); **Gomillion v. Lightfoot**, 364 U. S. 339, 349, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). "Whatever else the framers [of the Fourteenth Amendment] sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights . . ." **Shelly v. Kraemer**, 334 U. S. 1, 23, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).

These principles are particularly applicable to the election of representatives to the popular house of the National Legislature, for by the clear implication of Article I, § 2 and Section 2 of the Fourteenth Amendment, Representatives in Congress must be apportioned equally among the people within each state. As Mr. Justice Black said in **Colegrove v. Green**, 328 U. S. 549, at 570, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946) (dissenting opinion):

> "The purpose of this requirement is obvious: It is to make the votes of the citizens of the several states equally effective in the selection of members of Congress. It was intended to make illegal a nation-wide 'rotten borough' system as between the States. The policy behind it is broader than that. It prohibits as well Congressional 'rotten boroughs' within the States, such as the ones here involved."

Despite these clear constitutional imperatives, Georgia, by legislative lethargy, has perpetuated a system of congressional districts which deprives the Appellants, and all other qualified residents of the Fifth District, of one-half of the representation in the House of Representatives to which they are entitled. Under the present apportionment,

with the exception of one possible combination (the Third and Seventh Districts), the Fifth Congressional District is larger than any two other districts combined. Thus, the 563,000 residents of the Eighth and Ninth Districts control twice the number of congressmen as do the 823,000 residents of the Fifth District. In the election of congressmen, the ballots of individual voters residing in the Second District have more than 2.7 times the effective weight of the ballots cast by each of the Appellants in the Fifth District; those cast in the Eighth District are worth 2.8 times those of the Appellants; and those cast in the Ninth District are worth more than 3 times those cast by the Appellants. These disparities are invidiously discriminatory and contravene the guaranty of Equal Protection Clause of the Fourteenth Amendment. Cf. **Gray v. Sanders**, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963); **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Indeed, the District Court found the Georgia apportionment of congressional districts to be "grossly out of balance" (R. 40) and "arbitrary . . . when measured by any conceivable reasonable standard" (R. 45).

Despite these findings, a majority of that Court refused to hold the apportionment to be invalid under the Equal Protection Clause of the Fourteenth Amendment. This conclusion is based upon fallacious and untenable proposition that a classification of citizens which is arbitrary and without rational basis may nevertheless fail to amount to an invidious discrimination which is prohibited by the Fourteenth Amendment. As this Court's decision in **Morey v. Doud**, 354 U. S. 457, 463, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957), makes manifestly clear these terms are substantially synonymous:

> "The equal protection clause of the Fourteenth Amendment does not take from the State the power

to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is **without any reasonable basis**, and therefore is **purely arbitrary**." (Emphasis supplied.)

See **Quaker City Cab Co. v. Pennsylvania**, 277 U. S. 389, 406, 48 S. Ct. 553, 72 L. Ed. 927 (1928). Accepting the findings of the court below, it is indisputable that the Equal Protection Clause is violated by the apportionment.

These great disparities in population between congressional districts are not the product of a rational legislative judgment. Instead, they are the result of a legislative lethargy which has perpetuated the apportionment of 1931, despite the fact that its basis has been eroded away by the massive shifts in population which have occurred since its adoption. Thus even if the apportionment were valid in the circumstances of its enactment, the enormous changes wrought by the massive population shifts in the 30 years which have intervened since its enactment make irrational its continued application to the election of congressmen. **Nashville C. & St. L. Ry. v. Walters**, 294 U. S. 405, 415, 55 S. Ct. 486, 79 L. Ed. 949 (1935).

These factors make clear that there is here no room for the application of the presumption of constitutionality which usually appertains to state legislative action. As Mr. Justice Stone implied in **United States v. Carolene Products Co.**, 304 U. S. 144, 152, 58 S. Ct. 778, 82 L. Ed. 1234 (1938):

> "Legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

In this case, as in **Baker v. Carr**, the frequency and magnitude of the inequalities between congressional districts, as well as the manner of their creation, admits of no rational legislative policy whatever.[11] This encroachment upon the fundamental rights of the Appellants may be sustained only upon a strong showing by the State of a paramount and compelling interest which demands that their right to an equal voice in the selection of congressmen be subordinated in order that voters residing in other districts may be given a greater share in government. **Bates v. City of Little Rock**, 361 U. S. 516, 524, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960); **NAACP v. Alabama**, 357 U. S. 449, 460-65, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1957). This the Defendants have not even attempted. The irrational and invidious inequalities imposed by the present apportionment of congressional districts must be stricken as in contravention of the Equal Protection Clause of the Fourteenth Amendment.

The Constitutional standards of equality and rationality applicable to federal elections for Representatives in Congress are not necessarily identical to those which govern the States in the apportionment of their own legislatures. In apportioning their own legislatures, the States may have a broader range of discretion which may permit some departure from the principle of equal popular representation, thereby affording some measure of representation based on other factors. However, diverse state theories of representation can have no application in federal elections for national officers. In conferring representation upon "the People," the Constitution establishes a uniform federal standard of equal popular representation in the House of Representatives which neither the States nor Congress may vary.

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[11] 369 U. S. 186, 254, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), concurring opinion of Mr. Justice Clark.

Of course, abstract mathematical equality between congressional districts is not required. The Constitution requires only that the States make a conscientious attempt to achieve substantial equality of numbers within each district.[12] When measured by this standard, it is clear that the present apportionment of Georgia's ten congressional districts is clearly violative of the Fourteenth Amendment.

B. The Right to a Full Voice in the Selection of Representatives in Congress Is a Privilege and Immunity of National Citizenship Which Is Violated by the Disproportionate Apportionment of Georgia's Congressional Districts.

The right of the Appellants as electors qualified under the laws of the State of Georgia to full and equal representation in the House of Representatives is a privilege and immunity of national citizenship which is secured against invasion by the State by the Fourteenth Amendment. **United States v. Classic**, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941); **Twining v. New Jersey**, 211 U. S. 78, 97, 29 S. Ct. 14, 53 L. Ed. 97 (1908); **Wiley v. Sinkler**, 179 U. S. 58, 21 S. Ct. 17, 45 L. Ed. 84 (1900).

This Court, in **Twining v. New Jersey**, 211 U. S. 78, 97, 29 S. Ct. 14, 53 L. Ed. 97 (1908), established the controlling definition of those rights which are within the protection of the Privilege and Immunities Clause of the Fourteenth Amendment when it said:

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[12] A proposal has been made that, if this Court should require reapportionment, Georgia's most populous county, Fulton, should be made a single congressional district having a population 40% larger than state-wide average. Since Fulton County has already been subdivided into seven state senatorial districts, this proposal would hardly seem justified and would violate the basic constitutional requirement of substantial equality between districts.

"Privileges and immunities of citizens of the United States . . . are only such as arise out of the nature and essential character of the National Government or are specifically granted or secured to all citizens or persons by the Constitution . . .

"**Thus, among the rights and privileges of the national citizenship recognized by this court [is] . . . the right to vote for national officers**" (Emphasis supplied).

The right of a qualified citizen to participate in the selection of national officers is inherent in the nature of our government as one republican in form, and characterizes the relationship which exists between a citizen and the general government. The fundamental nature of this right was well described by Judge Parker in **Rice v. Elmore**, 165 F. 2d 387, 392 (4 Cir., 1947), in which he said:

"An essential feature of our form of government is the right of the citizen to participate in the governmental process. The political philosophy of the Declaration of Independence is that governments derive their just powers from the consent of the governed; and the right to a voice in the selection of officers of government on the part of all citizens is important, not only as a means of insuring that government shall have the strength of popular support, but also as a means of securing to the individual citizen proper consideration of his rights by those in power."

It is the Constitution which creates the right to vote for members of Congress. U. S. Const., Article I, § 2; **Wiley v. Sinkler**, 179 U. S. 58, 21 S. Ct. 17, 45 L. Ed. 84 (1900).[13]

[13] Although a few cases have mistakenly suggested that the right to vote for members of Congress is not a privilege and immunity of national citizenship but merely a privilege derived from the

It establishes the office, declares that it shall be elective and adopts as its criteria the qualifications prescribed by the states for the election of the most numerous branch of their legislatures. **Ex parte Yarbrough**, 110 U. S. 651, 662-663, 4 S. Ct. 152, 28 L. Ed. 274 (1884). It is the basic philosophy of the Constitution that every qualified elector shall have a right to a full and equal share in the selection of members of the lower house of the National Legislature. This right is expressly secured against malapportionment of Representatives among the several states by Article I, Section 2, and by Section 2 of the Fourteenth Amendment, which require that Representatives be apportioned among the several states according to their numbers. However, the constitutional policy securing to each citizen a full measure of legislative representation extends to guarantee the right against deprivations which may occur within a single state as well as those which may occur among the several states. **Colegrove v. Green**, 328 U. S. 549, 570, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), dissenting opinion.

The power to regulate the times, places and manner of election of members of Congress delegated by the Constitution to the States may not be exercised without regard to the limitations imposed by other sections of the Constitution. This power is, as Mr. Justice Black recog-

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States [See, e. g., *Minor v. Happersett*, 88 U. S. (21 Wall.) 162, 22 L. Ed. 627 (1872)], this proposition "was sharply rejected in *United States v. Classic*, 313 U. S. 299, 314-15, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941), in which the Court said:

> "The right of the people to choose . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the states entitled to exercise the right . . . While in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states [citations omitted] . . . this statement is true only in the sense that the states are authorized by the Constitution to legislate on the subject as provided by § 2 of Art. I . . ."

nized, "not to formulate policy, but rather to implement the policy laid down in the Constitution, that, so far as feasible, votes be given equally effective weight." **Colegrove v. Green**, 328 U. S. 549, 571, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), dissenting opinion.

This Court has been vigilant to protect the right of qualified citizens to participate in the selection of national officers. The right to vote conferred by Article I, § 2 has been held to include more than the right to merely mark a ballot and deposit it in a box. It includes the right to have the ballot counted. **United States v. Classic**, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941); **United States v. Mosley**, 238 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355 (1915). The right of the people to choose includes the right to have their ballots counted at their full value, undiminished by fraudulent ballots which may be cast in the same election, to the end that an individual voter will not be deprived of his full measure of participation in the selection of Representatives. **United States v. Saylor**, 322 U. S. 385, 64 S. Ct. 1101, 88 L. Ed. 1341 (1944).

Yet, the right to cast a ballot of full value is of little consequence if a state may, by the manipulation of congressional districts, deprive the ballot of all practical significance. If Georgia may allocate nine of its Representatives to the 270,000 residents of the Ninth Congressional District, while permitting the remaining three and one-half million citizens to elect only a single Representative, the government would cease to be responsive to the will of the people and to subserve those ends for which free governments are instituted.

> "[I]t is the experience of history that the exclusion of any group of men from power is, sooner or later, their exclusion from the benefits of power. The will of the State is always operated by a government in terms of the wants of those upon whom that gov-

ernment depends for the refreshment of its authority . . . .

"[N]o philosophy of politics can seriously claim to satisfy the demands of the individual unless it bases itself upon a recognition that citizens are equally entitled to the satisfaction of their desires. And the only way in which their desires can affect the will of the state with continuous emphasis is when the government of the state is compelled, by constitutional principle, to take them into definite account."[14]

Thus, it is apparent that the right of the people to vote for members of Congress and the right to full representation in Congress by congressional districts of approximately equal size are, by their nature, complementary in the constitutional structure. The protection of each is essential to the fulfillment of the other to the end that the government will remain responsive to the will of the people. For this reason, both are within the protection of the Privileges and Immunities Clause of the Fourteenth Amendment.

II. The Jurisdiction of the Federal Courts to Determine Constitutional Questions in Cases Involving the Apportionment of Congressional Districts Is Well Established in the Decisions of This Court.

A. The Standing of the Appellants to Maintain This Action Challenging the Validity of the Apportionment of Congressional Districts Which Deprives Them of Their Right to Equal Representation in the House of Representatives Is Beyond Dispute.

This action was brought by the Appellants as residents of Fulton County who are qualified to vote in elections for members of Congress from Georgia's Fifth Congres-

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[14] Laski, *An Introduction to Politics*, 37-38 (1931).

sional District. They seek to prevent the dilution of the effective weight of their individual ballots and the impairment of their representation in the House of Representatives under an arbitrary and irrational apportionment of congressional districts which deprives the Appellants and other residents of the Fifth Congressional District of more than one-half of their representation in Congress. Thus, it is clear that the Appellants have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions." **Baker v. Carr**, 369 U. S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962).

Indeed, so well established is the right of a qualified individual voter to maintain such an action, that the question is now beyond dispute. **Gray v. Sanders**, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963); **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); **Colegrove v. Green**, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1945); **Wood v. Broom**, 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 131 (1932); **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932); compare **Leser v. Garnett**, 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505 (1922), and **Fairchild v. Hughes**, 258 U. S. 126, 42 S. Ct. 274, 66 L. Ed. 499 (1922); **Hawke v. Smith** (No. 2), 253 U. S. 231, 40 S. Ct. 498, 64 L. Ed. 877 (1920).

B. This Action Against the Governor of Georgia and the Secretary of State Is Not an Unconsented Suit Against the State Which Is Forbidden by the Eleventh Amendment.

Although the defendants, Governor and Secretary of State of Georgia, have been brought before this Court because they are officers of the State of Georgia, this is not

an unconsented suit against the State forbidden by the Eleventh Amendment. This action is not one to compel the exercise of official powers by state officers, of which the federal courts are without jurisdiction, but one to enjoin the unconstitutional individual acts of state officials which the State is powerless to authorize. See **Georgia Railroad & Banking Co. v. Redwine**, 342 U. S. 299, 72 S. Ct. 321, 96 L. Ed. 335 (1952); **Ex parte Young**, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Thus, the Eleventh Amendment is not an obstacle to the maintenance of this action.

C. The Power of Congress Under Article I, Section 4 to Make or Alter Regulations Affecting Elections of Representatives and That of the House, Under Article I, Section 4, to Judge the Qualifications and Elections of its Members, Is Not Exclusive of the Jurisdiction of the Federal Courts to Determine Under Appropriate Constitutional Standards, the Validity of an Apportionment of Congressional Districts.

Although authority over congressional elections was, in the first instance, entrusted by the Constitution to the States, broad supervisory powers over federal elections were reserved by the Constitution to Congress. Thus, in Article I, it was provided:

> "Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."
>
> "Section 5. Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, . . ."

Nothing in the minutes of the Federal Convention justifies the assertion that the power of Congress over congressional elections was intended by the Framers to be exclusive.[15] As the constitutional debates make clear, Article I, Section 4, was intended only as a safeguard of the independence of the national government by withholding from the States uncontrolled power over congressional elections. Thus, the necessity for the provision was explained by James Madison in the Federal Convention:

> "The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudice. The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode. This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrolled right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures, and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they

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[15] Paschal, *The House of Representatives: "Grand Depository of Democratic Principle"?*; 17 Law & Contemp. Probl. 276 (1952). Black, *Inequalities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 Yale L. J. 13, 21 (1962).

would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter."[16]

There is nothing inherent in the nature of congressional redistricting which requires exclusive congressional control under the established principles of the political question doctrine. As this Court said in **Baker v. Carr**, 369 U. S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663 (1962):

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Since Congress has taken no steps to assure a more equitable apportionment of congressional districts, no question of review of determination of a coordinate branch of the federal government is presented by this appeal.

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[16] II Farrand, *The Records of the Federal Convention of 1787*, 240-41 (1937); See Madison, *The Federalist No. 60*.

As in **Baker v. Carr**, "The question here is consistency of state action with the Federal Constitution." 369 U. S. 186, 226, 82 S. Ct. 691, 715, 7 L. Ed. 2d 663 (1962). Nor will a determination of the Appellants' Fourteenth Amendment claims require the Court to enter upon policy determinations for which judicially manageable standards are lacking. "Judicial standards under the Equal Protection Clause are well developed and familiar and it has been open to courts [to make such determinations] since the enactment of the Fourteenth Amendment." **Baker v. Carr**, 369 U. S. 186, 226, 82 S. Ct. 691, 715, 7 L. Ed. 2d 663 (1962).

This Court, in a long series of decisions, has consistently asserted jurisdiction in cases involving the apportionment of congressional districts, despite arguments to the contrary that these cases presented non-judicial political questions which were exclusively vested in Congress under Article I, Sections 4 and 5. **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932); **Carroll v. Becker**, 285 U. S. 380, 52 S. Ct. 402, 76 L. Ed. 807 (1932); **Koenig v. Flynn**, 285 U. S. 375, 52 S. Ct. 403, 76 L. Ed. 805 (1932); **Wood v. Broom**, 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 131 (1932); **Colegrove v. Green**, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946).

In **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932), an individual voter residing in one of Minnesota's more populous congressional districts brought an action to invalidate the 1931 apportionment of Minnesota's nine congressional seats on grounds that it had been vetoed by the governor.[17] This Court, in an opinion

[17] It was also urged that the act was invalid because of its failure to comply with the requirements of Section 3 of the Act of 1911 which required that congressional districts "contain as nearly as practicable an equal number of inhabitants." 37 Stat. 13. See *Wood v. Broom*, 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 131 (1932);

written by Mr. Justice Hughes, rejected the contention that only non-justiciable political questions were presented and held the apportionment act invalid. The Court enjoined the election of Representatives under the existing apportionment and ordered that all nine Representatives be elected state-wide on an at-large basis if the state legislature failed to reapportion the State prior to the election. Similar relief was granted in Missouri, **Carroll v. Becker**, 285 U. S. 380, 52 S. Ct. 402, 76 L. Ed. 807 (1932), and New York, **Koenig v. Flynn**, 285 U. S. 375, 52 S. Ct. 403, 76 L. Ed. 805 (1932).

In **Wood v. Broom**, 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 131 (1932), the Court rested its decision on grounds which plainly could not have been reached if the jurisdiction of Congress were exclusive. In that case, an action was brought by a qualified Mississippi voter to enjoin elections under an apportionment of congressional districts. It was asserted that the apportionment violated Section 3 of the Act of 1911 which required that Representatives "be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants." Although these requirements had been omitted from the Act of 1929, the district court, over the strong dissent of Judge Holms,[18] accepted jurisdiction and granted an injunction. **Broom v. Wood**, 1 F. Supp. 134 (S. D. Miss. 1932). In reversing the decision below on the merits, this Court held that the provisions of the Act of 1911, which had been relied upon by the lower court had not been carried forward by the Act of 1929, and consequently, expired by their own lim-

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Mahan v. Hume, 287 U. S. 575, 53 S. Ct. 223, 77 L. Ed. 505 (1932).

[18] The grounds asserted in dissent were later adopted by Mr. Justice Frankfurter in *Colegrove v. Green*, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946).

itations.[19] Not a single justice accepted the arguments of Judge Holms, in his dissent in the lower court, that the issues presented were beyond the jurisdiction of the federal courts.

Similarly, in **Colegrove v. Green**, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1936), a majority of this Court, relying on **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932), squarely held the issue of the validity of an apportionment of congressional districts to be subject to its jurisdiction, rejecting the contention of Mr. Justice Frankfurter that the matter had been exclusively committed by the Constitution to the jurisdiction of Congress. See, **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

D. The Granting of an Effective Remedy by This Court Will Not Require It to Affirmatively Remap Congressional Districts Nor Bring It Into Conflict With Any Congressional Policy Favoring Elections by Districts.

Unlike the cases involving the apportionment of state legislative districts, a grant of relief in the present case will not require the exercise of political power by the State in order to prevent a default in representation. Nor is any question of judicial remapping or reconstruction of geo-political districts presented, for Congress has provided that, in the event of a failure of a State to enact a valid apportionment, Representatives are to be chosen state-wide in an at-large election. 2 U. S. C., § 2a (c); **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932).[20]

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[19] But see Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 Yale L. J. 13, 18-21 (1962).

[20] See Black, *Inequities in Districting for Congress: Baker v. Carr, and Colegrove v. Green*, 72 Yale L. J. 13, 16 (1962).

The Appellants ask only that the Georgia Congressional District Apportionment Act of 1931 be declared invalid and that the Governor and the Secretary of State be permanently enjoined from conducting elections thereunder. Such a decree would be identical to that which was granted by this Court in **Smiley v. Holm**, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932), and **Carroll v. Becker**, 285 U. S. 380, 52 S. Ct. 402, 76 L. Ed. 807 (1932). There the Court directed that "unless and until new districts are created, all Representatives allotted to the State must be elected by the State at large." **Smiley v. Holm**, 285 U. S. 355, 374-75, 52 S. Ct. 397, 76 L. Ed. 807 (1932).[21] The initiative and responsibility for the enactment of a new apportionment of congressional districts remains with the Georgia General Assembly. Guided by this Court's delineation of the applicable constitutional standards, the General Assembly which convenes in January of 1964, will have an ample opportunity to enact a new apportionment well in advance of the November elections. Only if the General Assembly fails to fulfill its constitutional responsibilities will Representatives be elected at-large.

The granting of such relief does not conflict with the policy of Congress which favors elections by districts. Although in normal circumstances Congress has indicated a preference for the election of Representatives by districts, Congress has expressly provided for at-large elections of Representatives in the event States should fail to reapportion after a reduction in its representation following a decennial census. 46 Stat. 26 as amended, 2 U. S. C., § 2a (c).[22] While not precisely applicable, this

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[21] In each instance the Representatives were elected at large, no new apportionment having been enacted by the legislatures. See Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1088 (1958).

[22] "Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which

statute provides strong evidence that the requirement that Representatives be elected by districts was not intended to be absolute or inflexible, but that Congress anticipated and sanctioned at-large elections of Representatives in extraordinary circumstances.

Perhaps the controlling considerations have best been stated by the Virginia Supreme Court of Appeals in **Brown v. Saunders**, 159 Va. 28, 166 S. E. 105, 111 (1932), in which the election of Virginia's nine Representatives on the basis of grossly unequal districts was enjoined. That Court said:

> "In reaching this conclusion, we are not unaware of the fact that since November 20, 1788, Virginia has been divided into districts for the purpose of the electors in the respective districts selecting one Representative to Congress, and that the result of this decision will be that for the first time in 144 years the entire membership in the House of Representa-

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such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large. June 18, 1929, c. 28, § 22, 46 Stat. 26, as amended Apr. 25, 1940, c. 152, §§ 1, 2, 54 Stat. 162; Nov. 15, 1941, c. 470, § 1, 55 Stat. 761." 2 U. S. C., § 2a (c).

tives from Virginia will be chosen by the electors in the state at large. However this may be, it is our duty, as it is the duty of all others, to obey the mandate of the fundamental law; and in obedience to the sovereign will of the people, speaking through the Constitution, we are forced to the conclusion reached in this case."

E. The Issues Presented by This Appeal Were Not Rendered Moot by the November General Election.

The Georgia statute creating the unequal apportionment of congressional districts did not expire with the general election and will continue to infringe the constitutional rights of the Appellants in all future elections unless its enforcement is restrained by this Court. The general election of November, 1962, was but the completion of one more of a long series of violations of Appellants' constitutional rights which have occurred in every election since the enactment of the apportionment in 1931 and which threatens to continue indefinitely until the statute is invalidated. **Porter v. Lee**, 328 U. S. 246, 66 S. Ct. 1096, 90 L. Ed. 1199 (1946). It is thus apparent that the controversy is a continuing one which was not mooted by the general election. **Gray v. Sanders**, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963). See **Southern Pacific Terminal Company v. Interstate Commerce Commission**, 219 U. S. 498, 31 S. Ct. 297, 55 L. Ed. 310 (1911); **Walling v. Helmrich**, 323 U. S. 37, 65 S. Ct. 11, 89 L. Ed. 29 (1944).

CONCLUSION.

The Appellants respectfully request that the decision of the District Court be reversed, and that the Georgia Congressional District Reapportionment Act of 1931 be declared unconstitutional and that the Appellees be perma-

nently enjoined from conducting elections for Representatives in Congress in conformity with its provisions.

Respectfully submitted,

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Proof of Service.

I, DeJongh Franklin, attorney for James P. Wesberry, Jr., and Candler Crim, Jr., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of September, 1963, I served copies of the foregoing Brief on the appellees therein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Eugene Cook, Attorney General, State of Georgia, State Law Building, Atlanta, Georgia, attorney of record for said appellees.

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APPENDIX A.

CONGRESSIONAL-DISTRICT REAPPORTIONMENT.

No. 157.

An Act to reapportion the several Congressional Districts of this State, by abolishing the twelve (12) districts created by the reapportionment Act of 1911, and creating in lieu thereof ten (10) Congressional Districts in this State, in accordance with the Act of Congress decreasing the number of congressmen from Georgia to ten (10); and for other purposes:

Repeal of Act of 1911 (Ga. L. 1911, p. 146).

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of same, that the Congressional reapportionment Act approved August 19, 1911, being Bill No. 244, pages 146, 147, and 148 of the Acts of 1911, shall be and the same is hereby repealed, and the twelve (12) Congressional Districts created thereby are thereby abolished.

Ten congressional districts created.

Sec. 2. Be it further enacted by the authority aforesaid, that the State of Georgia is hereby divided into ten (10) Congressional Districts, in conformity with the Act of Congress of the United States approved June 18th, 1929 decreasing the number of congressmen from Georgia to ten (10) each of said districts being entitled to elect one representative to the Congress of the United States. The districts shall be composed of the following counties, respectively:

1st district.

First District: Bryan, Bulloch, Burke, Candler, Chatham, Effingham, Emanuel, Evans, Jenkins, Liberty, Long, McIntosh, Montgomery, Screven, Tattnall, Toombs, Treutlen, and Wheeler.

2d district.

Second District: Baker, Brooks, Calhoun, Colquitt, Decatur, Dougherty, Early, Grady, Miller, Mitchell, Seminole, Tift, Thomas, and Worth.

3d district.

Third District: Ben Hill, Chattahoochee, Clay, Crisp, Dodge, Dooly, Harris, Houston, Lee, Marion, Macon, Muscogee, Pulaski, Quitman, Randolph, Schley, Stewart, Sumter, Taylor, Peach, Terrell, Turner, Webster, and Wilcox.

4th district.

Fourth District: Butts, Carroll, Clayton, Coweta, Fayette, Heard, Henry, Lamar, Meriwether, Newton, Pike, Spalding, Talbot, Troup, and Upson.

5th district.

Fifth District: Campbell, DeKalb, Fulton, and Rockdale.

6th district.

Sixth District: Baldwin, Bibb, Bleckley, Crawford, Glascock, Hancock, Jasper, Jefferson, Jones, Johnson, Laurens, Monroe, Putnam, Twiggs, Washington, and Wilkinson.

7th district.

Seventh District: Bartow, Catoosa, Chattooga, Cobb, Dade, Douglas, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker, and Whitfield.

8th district.

Eighth District: Atkinson, Appling, Bacon, Berrien, Brantley, Camden, Charlton, Clinch, Coffee, Cook, Echols, Glynn, Irwin, Jeff Davis, Lanier, Lowndes, Pierce, Telfair, Ware, and Wayne.

9th district.

Ninth District: Banks, Barrow, Cherokee, Dawson, Fannin, Forsyth, Gilmer, Gwinnett, Habersham, Hall, Jackson, Milton, Lumpkin, Pickens, Rabun, Towns, Stephens, Union, and White.

10th district.

Tenth District: Clarke, Columbia, Elbert, Greene, Hart, Lincoln, Madison, McDuffie, Morgan, Oconee, Oglethorpe, Richmond, Taliaferro, Walton, Warren, Wilkes, and Franklin.

Sec. 3. Be it further enacted by the authority aforesaid, that all laws, and parts of laws, in conflict herewith be and the same are hereby repealed.

Approved August 25, 1931.